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Supreme Court, U.S.
FILED
NOV 18 1997
CLERK

No. 97-309

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE AMERICAN BIBLE SOCIETY, *et al.*,
Petitioners,

vs.

BOYD L. RICHIE, as Guardian
of the Estate of LOUISE T. PETER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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November 18, 1997

Casillas Press, Inc. • 1717 K Street, N.W. • Washington, D.C. 20006 • 1-800-947-2650

15 pp

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ARGUMENT

In his Brief in Opposition, Respondent Boyd L. Richie asserts that this case does not merit review on writ of certiorari because the District Court can be relied upon to apply the 1997 version of the Charitable Gift Annuity Antitrust Relief Act, because fact issues precluded Petitioners' appeal, and because reasons not relied upon by the Fifth Circuit in its published opinion justify the imposition of sanctions. Petitioners respectfully submit this reply brief to address Respondent's arguments.

A. The Fifth Circuit's Application of the Antitrust Relief Act Warrants Review on Certiorari.

Respondent recognizes that granting the writ and vacating the decision below would be consistent with this Court's practice "in cases in which the law changes." Brief in Opposition at 10. Nevertheless, Respondent urges the Court to deny the writ because this "case presents no issue of broad public importance" and "the parties have ready access to review of the changed law by pursuing relief in the District Court." *Id.* at 9, 15. These arguments miss the point.

Contrary to Respondent's suggestion, this is not a case in which the law merely "changed." This is a case in which Congress, having read the Fifth Circuit's misinterpretation of a 1995 statute designed to save the nation's charities from the misapplication of the antitrust laws, unanimously enacted new statutory language "drafted in broader terms, so as to ensure that the provision will be interpreted by the courts in a manner which will achieve the goals of the 1995 Act." H.R. Rep. No. 146, 105th Cong., 1st Sess., at 3 (1997). In this very unusual case, the decision to be reviewed in light of new legislation was the ***cause*** of the new statute. In light of this peculiar causal relationship and the Court's oft-stated "obligation . . . to give effect to Congress' latest enactment," *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211,

115 S. Ct. 1447, 1457 (1995), denying the writ and allowing the Fifth Circuit's decision to stand would be an affront to Congress.

In addition, allowing the Fifth Circuit's decision to stand would undermine this Court's efforts to establish coherent rules of statutory interpretation. Importantly, this is not a case in which the Court of Appeals merely erred in discerning the will of Congress. Rather, this is a case in which the courts below, apparently offended by Congress' effort to affect the result in a case *sub judice*, seemed determined to frustrate Congress' exercise of its constitutional prerogatives to amend the antitrust laws and to make such amendments apply to pending cases. Indeed, the apparent failure of the courts below to question what they held to be the "plain meaning" of the 1995 Act in view of the Act's legislative history and manifest purpose suggests that those courts actually employed their "plain meaning" analysis as a substitute for -- rather than a method of discerning -- legislative intent.

Although this Court previously has cautioned that the "plain meaning" analysis is more "'an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists,'" *Watt v. Alaska*, 451 U.S. 259, 265, 266 (1981) (citation omitted), that warning appears to have provided insufficient guidance to the Fifth Circuit in interpreting the 1995 Act. Thus, Respondent misses the mark when he suggests that the absence of other cases involving the Antitrust Relief Act diminishes the public and jurisprudential importance of this case. In truth, correcting the Fifth Circuit's misguided "plain meaning" analysis is a matter of substantial public and jurisprudential import. Indeed, the rule that should emerge from this case is not simply that Petitioners are immune from Respondent's antitrust claims, but rather that courts "have no power to change deliberate choices of legislative policy that Congress has made within its constitutional powers." *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 215 (1962) (footnote omitted). Accordingly, this Court should grant the writ and

reaffirm that, "[w]here congressional intent is discernible," courts "must give effect to that intent." *Id.*

Contrary to Respondent's contentions, the proceedings in the District Court do not diminish the need for review. First, as stated in the Petition at 10 n.2, the District Court lacks this Court's authority and responsibility to correct the Fifth Circuit's errors. Second, it is far from clear that the ongoing proceedings in the District Court would expeditiously dispose of this action.

Like his submission in this Court, Respondent's response to Petitioners' motions to dismiss in the District Court stops short of conceding that the 1997 Act requires dismissal of his antitrust claims. Describing dismissal under the 1997 Act as "problematic," Respondent has attempted once again to persuade the District Court to ignore the will of Congress:

> Congress has passed a new statute that Defendants rely upon to dismiss Plaintiff's antitrust claims. That statute, however, relegates people to administrative remedies before the IRS that do not yet exist and indicates that Congress has not finally spoken on the subject matter of this lawsuit. Congress directed the Attorney General to study the new statute and report back to Congress on its anticompetitive effects and to recommend any amendments to the law. Previously, Defendants had argued that their earlier statute was a chameleon that could take on any meaning necessary to defeat Plaintiff's claims. Defendants are again relying on a shifting sands approach when they ask the Court to dismiss this case on the basis of a law that even Congress has said is not finished. Dismissal of this action is problematic so long as administrative remedies may conceivably be pursued and the status of the law is unclear.

Plaintiff's Response to Motions to Dismiss and Similar Motions at 2 (filed Sept. 15, 1997).[1]

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[1]Respondent's contempt for Congress' exercise of its prerogative

In light of Respondent's refusal to concede defeat under the 1997 Act, a denial of certiorari might well require further proceedings in the Court of Appeals. To avoid that result and to spare Petitioners from the burden of further proceedings below, this Court should grant the writ and reverse the Fifth Circuit's interpretation of the Antitrust Relief Act under the rule of *Schooner Peggy*. By granting the writ, vacating the Fifth Circuit's misapplication of the "plain meaning" rule, and ordering the dismissal of Respondent's antitrust claim under the 1997 Act, this Court can ensure the development of coherent rules of statutory interpretation

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to immunize Petitioners is evident in his argument to the District Court:

> Th[is] lawsuit shocked those in "Big Charity" who had come to see themselves as above the law. Defendants' contempt for the law was soon made manifest in numerous court filings that professed the view that Defendants were not only beyond the law, but were beyond the reach of this Court to determine whether or not they were.
>
> It soon became apparent to the Defendants that this Court did not share that view. Ultimately, neither did the Fifth Circuit. Defendants have not prevailed on a single substantive motion in this entire proceeding. Although it should have been obvious that their arrogance had led them to break the law and squeeze money out of vulnerable old people, Defendants showed no sign of contrition for the harm they had caused. Instead, they flexed their impressive muscle and bought and paid for a free pass from Congress. Thanks to Congress, Defendants have been given wide latitude to mislead, coerce, and trick millions more people into funding Defendants' opulent offices, their officials' high salaries, their incessant lobbying, and numerous other indulgences that have been well documented as characterizing the activities of "Big Charity." Under the new law, the strong may oppress the weak at will. While one may cling to the notion that might does not make it right, it appears that might can get one off the hook.

Plaintiff's Response to Motions to Dismiss and Similar Motions at 1-2 (filed Sept. 15, 1997) (footnote omitted).

and achieve Congress' intention to save charities from the burden and expense of this pernicious lawsuit.

B. The Fifth Circuit's Jurisdictional Error Warrants Review on Certiorari.

Respondent's contention that the Fifth Circuit's dismissal of Petitioners' appeal does not conflict with this Court's holdings in *Behrens* and *Mitchell* or otherwise justify review on writ of certiorari rests upon a profound misapprehension of Petitioners' argument. In particular, Respondent's argument at page 9 of his Brief in Opposition that fact issues precluded Petitioners' appeal under the collateral-order doctrine because "Petitioners had to factually meet the terms of the statute" ignores Petitioners' argument on appeal that Respondent bore the burden to plead and prove that Petitioners' conduct fell outside the scope of the immunity afforded by the 1995 Act.

In Petitioners' view, the 1995 version of the Act immunized from price-fixing claims the issuance of charitable gift annuities by recognized 501(c)(3) entities listed as such in the IRS' Publication 78. Beginning from that premise, Petitioners have argued consistently with this Court's *Noerr-Pennington* jurisprudence that a plaintiff seeking to base price-fixing liability on Petitioners' immunized conduct of issuing charitable gift annuities bore the burden to plead and prove conduct falling outside the exemption conferred by the 1995 Act. *See* Pet. App. at 95a n.4; *see also Professional Real Estate Investors, Inc. v. Columbia Pictures Industries*, 508 U.S. 49, 60-61 (1993) (holding that plaintiff who seeks to base antitrust liability on defendant's immunized conduct of bringing lawsuit must plead and prove that allegedly sham lawsuit was both objectively meritless and subjectively brought in bad faith). Thus, Petitioners have argued that Respondent bore the burden to plead and prove as part of his *prima facie* case that Petitioners' alleged rate-setting conduct fell outside the scope of the immunity conferred by the 1995 Act. *Id.*

Indeed, Respondent attempted to carry such a pleading burden by alleging that some of the Defendants who were listed in Publication 78 had obtained their 501(c)(3) statuses improperly and that various attorneys, actuaries, and commercial entities who were neither "described in section 501(c)(3) of title 26" nor "exempt from taxation under section 501(a) of title 26" had participated in an alleged rate-setting agreement involving Petitioners.

In Petitioners' view, Respondent's allegations did not satisfy his burden to plead conduct falling outside the 1995 Act, because Congress did not intend the 1995 Act's reference to "persons described in section 501(c)(3) of title 26 [and] exempt from taxation under section 501(a) of title 26" to establish a factual element of the immunity afforded by the Act. Rather, as noted above, Petitioners contend that the 1995 Act immunized from price-fixing claims all agreements establishing rates of return for charitable gift annuities issued by entities recognized by the IRS to be 501(c)(3) organizations, regardless of the alleged participation of non-501(c)(3) entities in such rate-setting agreements. *See* Petition at 5-6, 21-27.

Respondent's contention that a fact issue precluded Petitioners' appeal because "Petitioners had to factually meet the terms of the statute" is nothing more or less than a misguided assertion that Petitioners should have lost on the merits of their argument that they bore no burden to plead or prove the applicability of the 1995 Act. Accordingly, that assertion should not deter this Court from reviewing the Fifth Circuit's jurisdictional holding in this case.[2]

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[2]A recent case demonstrating the proper analysis of appeals from orders denying motions to dismiss private antitrust claims on immunity grounds is *Jordan v. Avco Financial Services of Georgia, Inc.*, 117 F.3d 1254 (11th Cir. 1997), in which the Eleventh Circuit properly recognized that its appellate jurisdiction under the collateral-order doctrine turned on whether the McCarran-Ferguson Act provided an immunity from suit and not on whether the plaintiffs' claims in that particular case fell within the scope of any such immunity. *See* 117 F.3d at 1256-58. In this case, the Fifth Circuit specifically reserved decision on the question

C. The Fifth Circuit's Imposition of Sanctions Warrants Review on Certiorari.

The contentions in Respondent's Brief in Opposition similarly should not deter this Court from granting certiorari to review the Fifth Circuit's imposition of sanctions.

First, Petitioners did nothing in perfecting or prosecuting their appeals that could justify an award of appellate sanctions in this case of first impression under the Antitrust Relief Act.[3] Second, and more importantly, the decision to grant certiorari should not turn on whether the Fifth Circuit could have imposed sanctions based on conduct the court declined to discuss in its opinion.

Because this Court sits more to ensure uniformity of results across cases than to correct erroneous decisions in particular cases, this Court's decision whether to grant discretionary review should turn in large part on the precedential effect of the decision to be reviewed. That precedential effect, of course, is based on what the lower court stated in its opinion. Accordingly, this Court's decision whether to review the Fifth Circuit's imposition of sanctions should turn on the precedential effect of what the Fifth

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whether the 1995 version of the Antitrust Relief Act conferred an immunity from suit. Pet. App. at 9a.

[3]Respondent's contention that sanctions could have been imposed because Petitioners appealed too many of the District Court's rulings is meritless. Although this Court's decision in *Swint v. Chambers County Commission*, 115 S.Ct. 1203 (1995), renounced the doctrine of pendent-party appellate jurisdiction, the *Swint* decision left open the possibility of pendent-issue appellate jurisdiction of issues inextricably intertwined with an issue that is immediately appealable under the collateral-order doctrine, *see id.* at 1212. In this case, some of the Petitioners appealed only the District Court's denial of their motion to dismiss and its related decision to allow Respondent to file the amended complaint that raised the purported fact issues on which the District Court relied to deny the motion to dismiss. *See* Respondent's Brief in Opposition at 5-6. Under *Swint*, appealing the inextricably intertwined order granting leave to amend clearly was not sanctionable.

Circuit actually held, as reflected in the precedent-setting opinion the Fifth Circuit actually issued. Indeed, little is less relevant to this Court's exercise of its certiorari jurisdiction than Respondent's assertion that the Fifth Circuit could have imposed sanctions based on conduct that the Fifth Circuit failed to discuss in its opinion.

Later courts will have only the Fifth Circuit's opinion to inform their discretion under FED. R. APP. 38. Respondent's recitation of Petitioners' other alleged infractions will not be available to later courts faced with the task of applying the Fifth Circuit's decision in this case to subsequent appeals. Thus, this Court should grant certiorari to review the Fifth Circuit's imposition of sanctions unless the Court is satisfied that the Fifth Circuit's opinion -- unaccompanied by Respondent's additional allegations -- properly applies an appropriate standard for imposing sanctions in cases of first impression.

Petitioners respectfully submit that the Fifth Circuit's opinion applies no such standard. Indeed, the Fifth Circuit's imposition of sanctions in this case of first impression conflicts with this Court's decision in *McKnight v. General Motors Corp.*, 114 S.Ct. 1826 (1994), which held that an appeal, even if not meritorious, was not sanctionable where "this Court had not yet ruled on" the question presented. It also conflicts with a number of decisions of the Courts of Appeals, including prior decisions of the Fifth Circuit. *See, e.g., Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1213 (6th Cir. 1997) (holding that appellate sanctions were inappropriate where "central issue was one of first impression"); *Estiverne v. Sak's Fifth Avenue*, 9 F.3d 1171, 1174 (5th Cir. 1993) ("Sanctions are inappropriate if the issue is one of first impression."); *Stebco, Inc. v. United States*, 916 F.2d 556, 558 (9th Cir. 1990) ("Because the reviewability of a district court's decision regarding venue in a §7429 proceeding is a question of first impression in this circuit, the government's attempt to appeal is not sanctionable conduct."); *Cullen v. Paine, Webber, Jackson & Curtis, Inc.*, 863 F.2d 851, 854 n. 5 (11th Cir. 1989)

(declining to impose sanctions where "appeal present[ed] an issue of first impression in this circuit"); *Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 749, 761 (1st Cir. 1988) (where appeal presented "important issues of first impression" in First Circuit, sanctions were "inappropriate"); *Hageman v. City Investing Co.*, 851 F.2d 69, 72 (2d Cir. 1988) ("Given the previously unresolved state of the law in this Circuit concerning the question of appellate jurisdiction in consolidated actions, it would be improper to award sanctions against a party whose appeal raise[d] the issue for the first time."); *Overnite Transp. Co. v. Chicago Indus. Tire Co.*, 697 F.2d 789, 794 (7th Cir. 1983) (holding that appeal was not frivolous where issues "had never previously been litigated under the Interstate Commerce Act"); *Asai v. Castillo*, 593 F.2d 1222, 1225 (D.C. Cir. 1978) (declining to impose sanctions where D.C. Circuit "had not previously addressed" issue presented by appeal). Thus, the Fifth Circuit's award of sanctions clearly warrants review in this Court.

CONCLUSION

For the reasons stated above and in their Petition for Writ of Certiorari, Petitioners respectfully request that the Court grant their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

November 18, 1997

Respectfully submitted,

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